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No. 15-145

IN THE

Supreme Court of the United States

HUSKY INTERNATIONAL ELECTRONICS, INC.

Petitioner,

v.

DANIEL LEE RITZ, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the "actual fraud" bar to discharge under § 523(a)(2)(A) of the Bankruptcy Code applies only when the debtor has made a false representation, or whether the bar also applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was actually intended to cheat a creditor.

LIST OF PARTIES

The parties in the court below were Husky International Electronics, Inc., and Daniel Lee Ritz, Jr.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Husky International Electronics, Inc., discloses that it is a privately held corporation that has no parent corporation and no publicly traded stock, and no publicly held company owns more than 10% of its stock.

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OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a) is reported at 787 F.3d 312. The opinion of the district court (Pet. App. 21a) is reported at 513 B.R. 510. The opinion of the bankruptcy court (Pet. App. 78a) is reported at 459 B.R. 623.

JURISDICTION

The Fifth Circuit entered judgment on May 22, 2015. JA35. Petitioner filed a petition for writ of certiorari on July 30, 2015, which this Court granted on November 6, 2015. 136 S. Ct. 445. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> ...
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> ....

STATEMENT OF THE CASE

Petitioner Husky International Electronics, Inc. ("Husky") sold and delivered electronic device components to Chrysalis Manufacturing Corporation

("Chrysalis"). Chrysalis never fully paid Husky. It could not. One of its owners, Respondent Daniel Lee Ritz, Jr. ("Ritz"), bankrupted Chrysalis, draining it of its assets and funneling them to other companies he controlled. These transfers allowed Ritz to benefit from Chrysalis's assets while shielding them from Chrysalis's creditors. Husky sued Ritz, arguing that he was personally liable for Chrysalis's debt to Husky because he used Chrysalis to perpetrate fraud for his own benefit. Ritz then filed for bankruptcy, and Husky initiated this adversary proceeding to bar discharge of Ritz's personal debt to Husky.

The Bankruptcy Code does not reward Ritz's fraudulent scheme. To the contrary, Congress specifically amended § 523(a)(2)(A) to prevent discharge of debts stemming from "actual fraud." That term has long been understood to include a transferee's receipt of property in a transaction that he knows is intended to defraud creditors. The Fifth Circuit nevertheless held that § 523(a)(2)(A) allows Ritz to erase the debt resulting from his deliberate fraud—for the sole reason that his fraud did not include a misrepresentation to Husky.

A. The Bankruptcy Code Bars Discharge Of Debts For Money Obtained By Actual Fraud

The Bankruptcy Code embodies the "basic policy" of "affording relief only to an 'honest but unfortunate debtor.'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)); *see Brown v. Felsen*, 442 U.S. 127, 128 (1979). To that end, although the Bankruptcy Code generally gives debtors a fresh start, it also bars discharge of

debts for various kinds of crimes, civil torts, and other wrongdoing. *See, e.g.*, 11 U.S.C. § 523(a)(2)(A) (fraud and misrepresentation); *id.* § 523(a)(4) (embezzlement and larceny); *id.* § 523(a)(9) (driving under the influence); *id.* § 523(a)(19) (violations of securities laws).

Section 523(a)(2)(A) specifically reflects Congress's judgment that "the interest in protecting victims of fraud" outweighs "the interest in giving perpetrators of fraud a fresh start." *Grogan*, 498 U.S. at 287; *see Cohen*, 523 U.S. at 221. It excepts from discharge "any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A); *see also* 11 U.S.C. §§ 727(b), 1328(a)(2) (making the discharge exceptions of § 523(a)(2)(A) applicable to individual bankruptcies under Chapters 7 and 13). Congress added the particular phrase "*actual fraud*" to § 523(a)(2)(A) in 1978, when it enacted the current Bankruptcy Code. Pub. L. No. 95-598, § 523(a)(2)(A), 92 Stat. 2549, 2590 (1978) (emphasis added).[1] That amendment accomplished two important objectives.

First, it restored the Code to align with earlier bankruptcy laws that had barred the discharge of debts arising from all intentionally fraudulent conduct. Before the 1978 amendment, § 523(a)(2)(A) barred discharge of "liabilities for obtaining money or

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[1] Section 523(a)(2) replaced § 17(a)(2) of the then-existing Bankruptcy Act, 11 U.S.C. § 35(a)(2) (1976). *See* H.R. Rep. No. 95-595, at 364 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

property by *false pretenses* or *false representations*." 11 U.S.C. § 35(a)(2) (1976) (emphasis added). But—unlike even earlier Bankruptcy Acts—it did not bar discharge of *other* types of fraud.[2]

For example, the Bankruptcy Act of 1867 expansively barred discharge of debts "created by the fraud ... of the bankrupt." Bankruptcy Act of 1867, ch. 176, § 33, 14 Stat. 517, 533. Congress amended this provision in 1898 to specify that the discharge bar applies to "debts ... [that] are judgments in actions for frauds, or obtaining property by false pretenses or false representations." Bankruptcy Act of 1898, ch. 541, § 17(a)(2), 30 Stat. 544, 550.

When Congress amended this provision again in 1903, it removed the discharge bar for "frauds," leaving only "false pretenses or false representations." *See* Ch. 487 § 17(a)(2), 32 Stat. 797, 798 (1903). It did so despite concerns from some members that the Bankruptcy Act should continue to prevent the discharge of debts for the "many *other* frauds ... besides false pretenses and false representations." 36 Cong. Rec. H1376 (statement of

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[2] The iteration of the Code in effect before the 1978 amendment to § 523(a)(2)(A) included a separate bar for discharge of debts that "were created by [a debtor's] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." 11 U.S.C. § 35(a)(4); *see also* Bankruptcy Act of 1898, ch. 541, § 17(a)(2), 30 Stat. 544, 550-51 (same). This discharge bar, which the 1978 amendments retained, *see* Pub L. No. 95-598, § 532(a)(4), 92 Stat. at 2591, applied only to fraud committed in a fiduciary capacity and thus did not capture frauds committed by non-fiduciaries. *See Crawford v. Burke*, 195 U.S. 176, 190 (1904).

Rep. Mann) (daily ed. Jan. 28, 1903) (emphasis added).

Congress closed this gap in 1978, amending § 523(a)(2)(A) so that "'actual fraud' is added as a grounds for exception from discharge." S. Rep. No. 95-989, at 78 (1978); H.R. Rep. No. 95-595 at 364. Because § 523(a)(2)(A)'s predecessor had already barred debts arising from "false pretenses" and "false representations," Congress's addition of "actual fraud" covered the "many other frauds" that previously had fallen outside the provision's scope.

Second, Congress's 1978 amendment "codif[ied]" the understanding of actual fraud articulated in *Neal v. Clark*, 95 U.S. 704 (1887). 124 Cong. Rec. H32399 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S33998 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini). Interpreting an earlier version of the Bankruptcy Code's fraud discharge bar, *Neal* explained that "*actual* fraud" means *intentional* fraud—that is, fraud in which an individual intends "himself to commit a fraud" or "to aid [someone else] in committing one." 95 U.S. at 707 (emphasis added). It further made clear that actual fraud specifically includes a transferee's participation in what he knows to be an intentional fraudulent conveyance. *See id.* Congress incorporated that understanding of actual fraud in § 523(a)(2)(A).

B. Ritz Orchestrates A Scheme To Defraud Husky

Respondent Daniel Lee Ritz, Jr., was at all relevant times in financial control and the partial owner of Chrysalis Manufacturing Corporation. Under Ritz's control, between 2003 and 2007,

Chrysalis purchased electronic components from Petitioner Husky International Electronics, Inc. Husky delivered the components, but Chrysalis never fully paid for them, leaving a total unpaid debt of $163,999.38. Pet. App. 2a.

While this debt was outstanding, Ritz fraudulently transferred over a million dollars from Chrysalis to at least seven other entities that he owned and controlled. *See* Pet. App. 2a. Chrysalis was insolvent during this time, was not paying its debts as they became due, and did not receive reasonably equivalent value in exchange for the transfers. Pet. App. 3a.

As Ritz himself admitted, such transfers personally benefitted him. *See* JA53-55. Before the transfers, Chrysalis held $163,999.38 that it owed to Husky. After Ritz drained Chrysalis of its assets, his other companies held an extra $163,999.38—and they did so free of any obligations to Husky. Ritz personally benefitted from these transactions because he owned and controlled the newly enriched businesses to which he diverted assets from Chrysalis.

C. After Husky Sues Ritz To Hold Him Personally Liable For His Fraud, Ritz Files for Bankruptcy And Attempts To Discharge His Debt To Husky

In May 2009, Husky sued Ritz in federal district court to hold him personally liable under Texas law for Chrysalis's debt to Husky of $163,999.38. Pet. App. 3a. Seven months later, and before Husky's case against Ritz in federal district court could be decided, Ritz filed a voluntary petition for bankruptcy under Chapter 7. Pet. App. 3a.

In March 2010, Husky initiated an adversary proceeding in the bankruptcy court, arguing that Ritz's debt to Husky was nondischargeable under the actual fraud bar of 11 U.S.C. § 523(a)(2)(A). *First*, Husky argued that the transfers from Chrysalis to Ritz's other companies, made "with actual intent to hinder, delay, or defraud [Chrysalis's] creditor[s]," were fraudulent under the Texas Uniform Fraudulent Transfer Act. Tex. Bus. & Com. Code § 24.005(a). *Second*, because Ritz caused Chrysalis "to be used" to "perpetrate" this "actual fraud" for his own "direct personal benefit" (as owner of the companies that received assets from Chrysalis), he was *personally* liable to Husky for the fraud under Texas's veil-piercing statute. Tex. Bus. Orgs. Code § 21.223(b); *see Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 509-11 (Tex. App. 2012) (piercing the veil under § 21.223(b) and holding owners personally liable for a fraudulent transfer of one company's assets to another company that they owned); *In re Morrison*, 361 B.R. 107, 120 (Bankr. W.D. Tex. 2007) (piercing the veil and imposing personal liability where "majority stockholder and President" of company used company to perpetrate a fraud and resulting "benefit to [the company] was a personal benefit to [him]"). *Third*, and as pertinent here, Ritz's "debt" to Husky—for "money" or "property" that Ritz "obtained by ... actual fraud," i.e., through his fraudulent-transfer scheme—is nondischargeable under 11 U.S.C. § 523(a)(2)(A).[3]

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[3] Husky also argued that Ritz's debt was nondischargeable under 11 U.S.C. § 523(a)(4), which applies to debts for fraud in a fiduciary capacity, and 11 U.S.C. § 523(a)(6), which applies to

D. The Lower Courts Find Ritz's Debt Dischargeable For The Sole Reason That His Fraud Against Husky Did Not Involve A Misrepresentation

1. The bankruptcy court held a four-day bench trial in February 2011. Although it found that Ritz intentionally drained Chrysalis of assets, it held that his debt to Husky was dischargeable because he made no misrepresentation to Husky.

At trial, Ritz testified that he "w[as] responsible for initiating and authorizing most ..., if not all, ... of the transfers of cash from Chrysalis to [his] various entities." JA51-52; *see* JA49 (admitting that Ritz "initiate[d] and authorize[d] many of the transfers" from Chrysalis to other businesses he controlled). He agreed that, "if money got moved, [he] knew about it and probably, in most cases, instructed it." JA47. Indeed, the employee responsible for executing the transfers testified that she "didn't take direction from anybody else to move funds other than Mr. Ritz." JA67. And another witness with access to the

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(continued...)

debts for "willful and malicious injury by the debtor." *See* Pet. App. 79a. The bankruptcy court rejected Husky's reliance on § 523(a)(4), Pet. App. 93a, a ruling that Husky did not appeal, *see* Pet. App. 3a n.2. Furthermore, despite the bankruptcy court's finding that Ritz "was trying to drain" Chrysalis, JA82, and the district court's finding that Ritz used Chrysalis to defraud creditors, Pet. App. 68a-69a, both courts found that Husky failed to meet its burden to show that Ritz intended to willfully and maliciously injure Husky, as required by § 523(a)(6), Pet. App. 77a, 96a-97a. The Fifth Circuit affirmed. Pet. App. 18a.

"financial records" of Ritz's companies testified that there was no doubt "in [his] mind" that Ritz "was running the show financially speaking." JA71.

Ritz further agreed that such transfers from Chrysalis to his other companies benefited him personally. JA53-55. And although he characterized the "hundreds" of payments among his companies as "loans," Ritz admitted that "there were no repayment terms," and that "none" of the so-called loans were "documented with any notes or anything else." JA42; JA55. One of his employees further confirmed that "there were no loan documents," and the payments were not "official loans." JA67.

The bankruptcy court concluded that Ritz was "not a credible witness." Pet. App. 83a. It highlighted his "blatantly contradictory" and "evasive[]" testimony, which was at times "disingenuous, if not downright misleading"; it also noted his "selective" inability to remember certain information when questioned under oath on the witness stand. Pet. App. 83a-85a; *see* Pet. App. 98a ("the Debtor is not an upstanding businessman who can be trusted"); JA82 ("I don't believe Mr. Ritz. I found him to be a witness with virtually no credibility.").

Ritz himself recognized that much of his testimony represented "dramatic changes" to earlier statements he made under oath and during discovery. JA47 ("Q: [Y]ou have come to court and you have made dramatic changes in the sworn testimony you gave, isn't that true, sir? A: I think there are some changes, yes sir."); *see also*, *e.g.*, JA41; JA51. For example, although he testified at his March 2008 deposition that the loans were "documented in the

form of a note or loan agreement," he admitted at trial that there were no such records. JA42-44. And while Ritz testified at trial that he "initiate[d] and authorize[d] many of the transfers" from Chrysalis, he stated in his interrogatory responses that he "did not initiate or authorize any of th[e] transfers." JA49-50. Ritz never corrected or updated his prior statements; rather, he claimed at trial that he "ha[d] a much more full understanding of the facts now than [he] did then." JA45-47. Not surprisingly, other witnesses testified that they had a "[p]oor" "opinion of Mr. Ritz's character for truthfulness." JA68; *see* JA73 ("Q: You don't have a very high opinion of Mr. Ritz today, do you? A: Well no, I do not."); JA77-78 (witness was "disappointed" by Ritz's interrogatory responses because he "did not believe them to be truthful").

In August 2011, the bankruptcy court made findings of fact and conclusions of law. Pet. App. 78a. The court found that Ritz intentionally "drained substantial funds out of Chrysalis's operating account and funneled these funds to other entities [he] controlled." Pet. App. 98a. As the bankruptcy court put it, "I think [Ritz] drained Chrysalis of a lot of money.... I think he was *trying* to drain that company." JA82 (emphasis added). The court further found that the transfers "orchestrat[ed]" by Ritz were not made for reasonably equivalent value, and that Husky suffered damages in the full amount of $163,999.38. Pet. App. 82a.

Nevertheless, the bankruptcy court held as a matter of law that Ritz's conduct did not constitute "actual fraud" under § 523(a)(2)(A) for the sole reason that he did not make any "false representation" to

Husky in the course of his fraudulent-transfer scheme. Pet. App. 92a.[4] The bankruptcy court encouraged Husky to appeal its decision, emphasizing that "what Mr. Ritz did should not be allowed." JA84. The court further stated, "I don't think I've ever said this on the record, but I'm going to say it now. I hope you do appeal me. I hope an Appellate Court tells me I'm wrong, because I don't believe Mr. Ritz. I think he was trying to drain that company." JA82.

2. Husky appealed to the district court. That court held that Ritz was personally liable to Husky under Texas law. It first explained that Texas law imposes personal liability on a shareholder who uses a corporation to perpetrate an "actual fraud" for his personal benefit. Pet. App. 69a-70a (citing Tex. Bus. Orgs. Code § 21.223). Contrary to the bankruptcy court's ruling, the district court held that actual fraud under Texas law does "*not* require a misrepresentation." Pet. App. 69a (emphasis added). Rather, actual fraud includes a transfer made "with actual intent to hinder, delay, or defraud creditors." Pet. App. 71a-72a (quoting Tex. Bus. Orgs. Code § 24.005(a)(1)). The court accordingly held that Ritz was personally liable to Husky under Texas law "[b]ecause ... Ritz caused Chrysalis to be used for the purpose of perpetrating and did perpetrate an actual fraud on its creditors primarily for Ritz's direct personal benefit, i.e., he drained Chrysalis of funds

[4] For the same reason, the bankruptcy court held that Ritz had not committed "actual fraud" under Texas law and therefore was not personally liable to Husky. Pet. App. 92a; *see* Tex. Bus. Orgs. Code § 21.223(b).

and fraudulently transferred those funds to other entities under his control and/or ownership." Pet. App. 68a-69a.

The district court nevertheless held that, as a matter of federal law, Ritz's debt to Husky was dischargeable in bankruptcy. Despite acknowledging that "actual fraud" under Texas law does not require a misrepresentation, the district court determined that § 523(a)(2)(A)'s use of the same phrase *does* require a misrepresentation. Pet. App. 72a. The dispositive legal issue, according to the district court, was that Husky failed to allege a misrepresentation by Ritz, and therefore his conduct could not constitute "actual fraud" within the meaning of § 523(a)(2)(A). Pet. App. 73a-74a.

3. The Fifth Circuit affirmed, holding that a false representation by the debtor "is a necessary prerequisite for a showing of 'actual fraud' under Section 523(a)(2)(A)." Pet. App. 17a. In light of that conclusion, and because "the parties agree[d]" that Ritz's fraudulent-transfer scheme did not involve a misrepresentation, the court held that § 523(a)(2)(A) did not bar the discharge of Ritz's debt to Husky. Pet. App. 17a. The court did not reach Ritz's arguments that he was not personally liable to Husky under Texas law, Pet. App. 6a, that "the debt at issue was not 'obtained by fraud,'" and that "Ritz did not make the transfers with the intent to deceive Husky," Pet. App. 7a n.4.

The Fifth Circuit acknowledged the Seventh Circuit's contrary interpretation of § 523(a)(2)(A) in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). Pet. App. 7a. *McClellan* held that "actual fraud"

under § 523(a)(2)(A) "is not limited to misrepresentations and misleading omissions," but also includes deliberate fraudulent-transfer schemes. 217 F.3d at 893. *McClellan* explained that "fraud" itself "includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated," and "*actual* fraud" means that the fraud was intentional. *Id.* (internal quotation marks omitted; emphasis added). "[B]y distinguishing between 'a false representation' and 'actual fraud,'" the court further explained, § 523(a)(2)(A) "makes clear" that "actual fraud" "is not limited to misrepresentations and misleading omissions" and includes transfers "intended ... to hinder ... creditors." *Id.* at 893-94. The First Circuit later followed *McClellan* in *In re Lawson*, holding that "the 'actual fraud' exception to discharge under § 523(a)(2)(A) includes knowing receipt of a fraudulent conveyance" designed to hinder, delay, or defraud creditors. 791 F.3d 214, 225 (1st Cir. 2015).

Parting ways with *McClellan*, the Fifth Circuit based its narrow understanding of actual fraud on this Court's decision in *Field v. Mans*, 516 U.S. 59 (1995). *Field* addressed "the level of reliance that § 523(a)(2)(A) requires a creditor to demonstrate" in order to bar discharge where the debtor has allegedly committed fraud by misrepresentation. *Id.* at 63. The Fifth Circuit recognized that *Field* did not "directly address[] the issue" of whether actual fraud requires a misrepresentation—indeed, the *Field* Court had no reason to consider other possible forms of fraud because "the facts underlying *Field* involved a misrepresentation." Pet. App. 10a-11a. But the Fifth Circuit nevertheless stated that "[the] opinion

in *Field* appeared to assume that a false representation is necessary to establish 'actual fraud.'" Pet. App. 10a (citing *Field*, 516 U.S. at 68, 79).

The Fifth Circuit further noted that "another provision of the Bankruptcy Code, Section 727(a)(2), excepts from discharge certain fraudulent transfers," and it surmised (without elaboration) that other provisions of the Bankruptcy Code "may be rendered redundant" by *McClellan*'s understanding of actual fraud. Pet. App. 16a (citing 11 U.S.C. §§ 727(a)(2), 523(a)(4), 523(a)(6)). Finally, the Fifth Circuit observed that, "to the extent Section 523(a)(2)(A) is ambiguous, 'exceptions to discharge should be construed in favor of debtors in accordance with the principle that provisions dealing with this subject are remedial in nature and are designed to give a fresh start to debtors unhampered by pre-existing financial burdens.'" Pet. App. 16a (quoting *Fezler v. Davis*, 194 F.3d 570, 573 (5th Cir. 1999)).

SUMMARY OF ARGUMENT

In 1978, Congress added "actual fraud" to § 523(a)(2)(A). Before the amendment, § 523(a)(2)(A) already barred the discharge of debts arising from all manner of intentional misrepresentations ("false pretenses" and "false representations"). Congress did not add "actual fraud" to § 523(a)(2)(A) merely to repeat its preexisting scope. Rather, Congress's amendment must have substantive meaning. That meaning—drawn from hundreds of years of common-law cases and from this Court's case law, which Congress codified—is that actual fraud refers to any intentional fraud, and includes a transferee's

participation in a transfer scheme that he knows is intended to defraud creditors. Actual fraud does not categorically require a misrepresentation, and this Court should reverse the Fifth Circuit's contrary conclusion.

I. This Court interprets terms in the Bankruptcy Code in accordance with their common-law meaning. At common law, the term *actual* fraud has long meant *intentional* fraud. As this Court explained in *Neal* (the decision Congress codified when it added "actual fraud" to § 523(a)(2)(A), *see supra* at 5), the difference between actual fraud and constructive fraud hinges on the actor's motives. It has nothing to do with whether the fraud involves a misrepresentation or takes some other form. Indeed, the common law has long recognized many forms of fraud; some involve misrepresentations, and others do not. Thus, *Neal* made clear that receiving a fraudulent transfer, with intent to commit a fraud or to help the transferor in doing so, makes the transferee liable for actual fraud. That is so even though the transferee's fraud involves no misrepresentation whatsoever.

Neal's understanding of actual fraud is consistent with centuries of common-law jurisprudence, including in the specific context of debtor-creditor relations. The common law has always recognized that conveyances that hinder creditors' rights are a form of fraud. When a debtor transfers his property *intending* to defraud creditors, he engages in actual fraud. And because a transferee who receives property through such a conveyance *knowing* of its fraudulent purpose is actively participating in the fraud and aiding its consummation, courts have long

held that he, too, commits actual fraud. Section 523(a)(2)(A) therefore bars the discharge of the transferee's debt arising from his knowing participation in the scheme.

II. The structure, history, and purpose of § 523(a)(2)(A) further confirm that actual fraud does not categorically require a misrepresentation.

Before Congress amended § 523(a)(2)(A) to bar discharge of debts arising from "actual fraud," the provision already applied to debts for money or property obtained by "false pretenses" and "false representations." These two terms had distinct meanings, collectively barring discharge of debts for all criminal ("false pretenses") and civil ("false representations") forms of intentional misrepresentations. In amending the statute, Congress sought to extend the discharge bar to an additional type of wrongdoing. After all, Congress did not amend § 523(a)(2)(A) merely to repeat the range of intentional misrepresentations that the statute already covered. Rather, actual fraud must mean something in addition to an intentional misrepresentation. As the First and Seventh Circuits recognized, the common-law understanding of actual fraud provides that additional meaning: Actual fraud refers to all intentional fraud, including deliberately fraudulent conveyances.

Section 523(a)(2)(A)'s surrounding text also easily encompasses debts for money or property obtained by what the recipient knows to be an intentionally fraudulent transfer. Section 523(a)(2)(A) bars discharge of "any debt ... for money [or] property ... to the extent obtained by ... actual fraud." As this

Court has explained, a "debt" means any enforceable obligation, and the phrase "obtained by" requires that the defendant receive money or property as a result of his fraud. Because a transferee who receives property knowing of the fraudulent nature of the conveyance is himself guilty of actual fraud, he "obtain[s]" "money" or "property" "by ... actual fraud." 11 U.S.C. § 523(a)(2)(A).

This understanding of actual fraud is also consistent with the Bankruptcy Code's policy of affording relief to only the honest but unfortunate debtor. Congress has long sought to prevent the Bankruptcy Code from becoming an engine of fraud and corruption. Indeed, that is the very purpose of § 523(a)(2)(A)'s discharge bar for debts resulting from fraud. In enacting this broad discharge bar and expanding it to include "actual fraud," Congress did not intend to carve out—and thereby encourage—forms of actual fraud that happen not to involve a misrepresentation.

III. The Fifth Circuit nevertheless held that Ritz's claim is dischargeable under § 523(a)(2)(A), solely because it concluded that "actual fraud" categorically requires a misrepresentation. In so holding, the Fifth Circuit misread *Field*, a decision in which this Court never considered (and had no reason to consider) whether misrepresentation is the *only* type of fraud that can give rise to a nondischargeable debt under § 523(a)(2)(A). Moreover, *Field*'s *methodology*—looking to the common-law understanding of actual fraud against which Congress amended the statute in 1978—disproves the Fifth Circuit's holding. The Fifth Circuit also incorrectly surmised, largely without explanation, that Husky's interpretation of

actual fraud would render other provisions of the Bankruptcy Code superfluous. Finally, the Fifth Circuit relied on the Code's "fresh start" policy to support its narrow construction of § 523(a)(2)(A). But Congress has determined that protecting victims of fraud outweighs the interest in giving perpetrators of fraud a fresh start.

ARGUMENT

Section 523(a)(2)(A) bars the discharge of "any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud[.]" The question presented asks what "actual fraud" means: Does it categorically require a misrepresentation, or does it also include an intentional fraudulent transfer?

The common-law meaning of actual fraud, the statutory structure and history of § 523(a)(2)(A), and the policies underlying the Bankruptcy Code all point to the same answer: Actual fraud includes a transferee's participation in a conveyance that he knows is intended to defraud creditors.

I. THE COMMON-LAW MEANING OF ACTUAL FRAUD HAS ALWAYS INCLUDED FRAUDULENT CONVEYANCES INTENDED TO CHEAT CREDITORS

This Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purposes." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). "It is well established that where Congress uses terms that

have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Field*, 516 U.S. at 69 (internal quotation marks and citation omitted). And when Congress added "actual fraud" to § 523(a)(2)(A) in 1978, that term had a settled meaning that encompassed a transferee's participation in a deliberate fraudulent-transfer scheme, knowing of its fraudulent purpose.

The common law recognized many forms of fraud, some of which required a misrepresentation and others of which did not. As this Court explained in *Neal*, *actual* fraud means *intentional* fraud. The modifier "actual" refers to the perpetrator's mindset—i.e., intentionally fraudulent conduct, as distinct from fraud implied in law. It is thus "unrelated to whether the intent to defraud was implemented by a misrepresentation or by some other improper means." *McClellan*, 217 F.3d at 894. Indeed, *Neal* applied the term "actual fraud" to conduct that did not involve any misrepresentation at all.

Countless common-law cases, including in the context of debtor-creditor relations, confirm this understanding of actual fraud. The common law has long recognized that conveyances that hinder creditor rights are a form of fraud. When those conveyances are orchestrated with an intent to defraud creditors, courts have always referred to them as a form of actual fraud. And when a defendant receives property in such a scheme, knowing of its fraudulent purposes, he, too, commits actual fraud. Congress incorporated this settled meaning in § 523(a)(2)(A).

A. Actual Fraud Is Any Intentional Fraud

When Congress added "actual fraud" to § 523(a)(2)(A) in 1978, the term was understood to mean any intentionally fraudulent conduct (regardless of whether the particular form of fraud involved a misrepresentation). This Court recognized that meaning more than 100 years ago in *Neal*, and Congress amended § 523(a)(2)(A) with that understanding in mind. *See supra* at 5.

1. In *Neal*, the executor of an estate sold two of the estate's bonds to Neal at a significant discount. *See* 95 U.S. at 704. The sale of these bonds for less than their true worth constituted a *devastavit* on the estate and its beneficiaries, a type of fraudulent conveyance. *See id.* at 706; *see also, e.g.*, *Everingham v. Vanderbilt*, 51 How. Pr. 177, 183 (N.Y. 1876). When the executor was called to account for the distribution of the estate's assets, the court ordered him to provide a new bond to the beneficiaries to make up for the *devastavit* he committed by selling the estate's property to Neal for too low a price. *See Neal*, 95 U.S. at 704-05. He did so, with others as sureties for the new bond. *See id.* The executor subsequently became insolvent, and the sureties on the executor's bond sued Neal. They alleged that Neal was directly liable to the estate's beneficiaries for fraud because he had participated in the *devastavit*. *Id.* at 705. Neal declared bankruptcy and argued that his debt arising from the purchase of the bonds was dischargeable. *Id.* This Court therefore considered whether Neal's debt fell within § 33 of the Bankruptcy Act of 1867, which provided that "no debt created by the fraud ... of the bankrupt ... shall be discharged under this act." *See id.* at 706 (quoting

Bankruptcy Act of 1867, ch. 176, § 33, 15 Stat. at 533).

To answer that question, the Court had to determine whether Neal's participation in the executor's *devastavit* constituted actual fraud, as opposed to merely constructive fraud, because the Court construed the Bankruptcy Act to bar discharge for only actual fraud. *See id.* at 707, 709. This question, the Court explained, hinged on Neal's *motives*. Actual fraud is "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong," *id.* at 709, such that the actor intends either "himself to commit a fraud" or "to aid [someone else] in committing one," *id.* at 707. Constructive fraud, by contrast, is "implied fraud, or fraud in law," *id.* at 709, and thus may exist despite the actor's "good faith" or lack of knowledge, *id.* at 707.

The Court held that Neal's debt was dischargeable because it resulted from constructive fraud. *See id.* at 709. The fraud was merely constructive because Neal "purchased the bonds in good faith," without fraudulent intent, and "having no reason to believe" that the executor who sold him the bonds intended "any wrong to those interested in the estate which he was administering." *Id.* at 707. Conversely, however, had Neal "entertained any purpose himself to commit a fraud, or to aid the executor in committing one," then his purchase of fraudulently transferred property would have made him guilty of "actual fraud." *Id.*

2. *Neal*'s analysis illustrates two important points, which other cases corroborate. *First*, *Neal* confirms that the line between actual and

constructive fraud hinges on the actor's intent. *See id.* at 707, 709. Similarly, in *Coder v. Arts*, this Court considered whether a debtor's conveyance to one of his creditors was void under the Bankruptcy Code. 213 U.S. 223, 231 (1909). The answer depended on whether the conveyance constituted an actual fraud—an inquiry that, the Court explained, "depends upon the motive." *Id.* at 242. Because the grantor "had no intention to hinder, delay, or defraud his creditors," and the recipient acted in good faith, "was ignorant of the insolvency of the grantor, and had no reason to believe that a preference was intended," the Court concluded that there was no actual fraud. *Id.* at 244-45. *See also, e.g.*, *Bullis v. O'Beirne*, 195 U.S. 606, 617, 620-21 (1904) (finding actual fraud based on the actor's intent to deceive); *Ames v. Moir*, 138 U.S. 306, 312 (1891) ("vital inquiry" whether defendant's conduct constituted actual or merely constructive fraud hinged on whether he intended to defraud others).

Second, *Neal* established that whether conduct is actual fraud does not depend on whether the perpetrator made a misrepresentation. After all, Neal did not make any false statements, but his participation in the *devastavit* was a form of fraud. *See* 95 U.S. at 707-08. And Neal *would* have been guilty of *actual* fraud—and his debt for fraud would have been nondischargeable under the early precursor of § 523(a)(2)(A)—if only "he entertained any purpose himself to commit a fraud, or to aid the executor" in the fraudulent transfer. *Id.* at 707.

Indeed, common-law fraud has long "encompass[ed] many different and ever-innovative forms." *Wallace v. Wallace*, 291 S.E.2d 386, 387 (W.

Va. 1982). That is because fraud is a "generic term" that "includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." *McClellan*, 217 F.3d at 893; *see Lawson*, 791 F.3d at 219, 225 (same); *see also, e.g.*, *Chien v. Chen*, 759 S.W.2d 484, 494-95 (Tex. App. 1988) ("At common law, the word 'fraud' refers to an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage." (emphasis deleted)); *Arizona v. Scofield*, 438 P.2d 776, 781 (Ariz. Ct. App. 1968) ("Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another." (internal quotation marks omitted)); *Seeberg v. Norville*, 85 So. 505, 507 (Ala. 1920) ("[F]raud consists in acts, or omissions to act, which involve a breach of legal duty, trust, or confidence, which are injurious to the party complaining[.]"); *Smith v. Harrison*, 2 Heisk. 230, 243 (Tenn. 1870) (Fraud "embraces 'all acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.'" (quoting 1 Bouv. L.D., 613)).

To be sure, at common law, some forms of fraud, such as the tort of deceit, did require "a misrepresentation of fact, opinion, intention, or law." Restatement (Second) Torts § 525 (1977); *see also, e.g.*, Restatement (Second) Contracts § 164(1) (1981) (contract voidable if "assent is induced by either a fraudulent or a material misrepresentation by the

other party"). But others plainly did not. For example, "[a]ll undue influence is a species of fraud." *Cox v. Hale*, 114 So. 465, 467 (Ala. 1927); *see, e.g.*, *Redford v. Booker*, 185 S.E. 879, 885 (Va. 1936). So, too, are conveyances that defraud another of his property rights, including transfers that diminish an estate, *see Neal*, 95 U.S. at 707; *Everingham*, 51 How. Pr. at 183; transfers intended to defeat a divorcing spouse's property interest, *see, e.g.*, *Wallace*, 291 S.E.2d at 388; and transfers that hindered or delayed creditors, *see Lawson*, 791 F.3d at 219-220 & n.7; *McClellan*, 217 F.3d at 893-94; *infra*, Part I.B. *See also* 37 Am. Jur. 2d Fraud and Deceit § 5 ("[c]ollusion" to "defraud another of his or her rights by the forms of law or to secure an object forbidden by law" is "a species of fraud").

In sum, at common law, actual fraud meant *intentional* fraud, without regard for whether the particular fraudulent conduct involved a misrepresentation.

B. Common-Law Actual Fraud Has Always Included The Knowing Receipt Of A Deliberately Fraudulent Conveyance

As particularly relevant here, it has long been clear that conveyances orchestrated with an *intent* to hinder, delay, or defraud creditors are a type of actual fraud. Indeed, it has been the law for centuries—beginning with the Statute of Elizabeth, which shaped U.S. common law—that both a transferor who initiates such a conveyance and a transferee who receives property through it, knowing of its fraudulent purpose, are liable for actual fraud.

1. Conveyances that are intended to cheat creditors have been a form of actual fraud since at least the sixteenth century. Beginning with the Statute of 13 Elizabeth, the law afforded relief for "'covinous and fraudulent' transfers designed 'to delay, hinder or defraud creditors and others.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540 (1994) (quoting 13 Eliz., ch. 5 (1571)). Because such transfers were made with "actual fraudulent intent," they were "infected by actual fraud." *Id.* at 535, 540-41 (citing *Twyne's Case*, 3 Coke Rep. 80b, 76 Eng. Rep. 809 (K.B. 1601); O. Bump, Fraudulent Conveyances: A Treatise upon Conveyances Made by Debtors to Defraud Creditors 31-60 (3d ed. 1882)).

Although a *transferor* who conveyed his property intending to cheat creditors was always guilty of actual fraud, the remedy for such transfers turned in part on whether the *recipient* was also culpable. If the recipient was a "bona fide" purchaser who provided "good consideration" and did not have any "notice or knowledge of [the] covin, fraud or collusion" on the part of the transferor, no relief was available to creditors. 13 Eliz., ch. 5[6]. Such good-faith recipients faced no liability for receiving the property because they were not themselves guilty of actual fraud. *See, e.g.*, *Bean v. Smith*, 2 F. Cas. 1143, 1150-53 (C.C.D.R.I. 1821) (discussing cases applying Statute of Elizabeth). But if the recipient knew that the transfer was fraudulent, his purchase "assist[ed] in the consummation of the fraud," making him an equal participant. *Garland v. Rives*, 4 Rand. 282, 304 (Va. 1826) (describing Statute of Elizabeth). Because such a transferee was a party to the actual fraud, he had no rights to the transferred property and the

transfer was void. *See Graham v. Fubber*, 14 C.B. 410, 139 Eng. Rep. 169 (K.B. 1854) (transfer void where defendant knew that it was fraudulent); *Twyne's Case*, 3 Coke Rep. at 83b, 76 Eng. Rep. at 823 (recipient of actually fraudulent transfer convicted of fraud).

For example, in an effort to shield his property from creditors, the debtor in *Twyne's Case* secretly assigned all of it to Twyne, but continued to use the property as his own. 3 Coke Rep. at 80b, 73 Eng. Rep. at 810. When the debtor's creditors attempted to seize the property, Twyne claimed that it belonged to him. *See id.* at 80b, 73 Eng. Rep. at 811 12. The creditors argued that the conveyance to Twyne was fraudulent and therefore void under the Statute of Elizabeth. *See id.* at 80b, 73 Eng. Rep. at 812. Twyne did not dispute that the debtor acted with a fraudulent intent, but he nevertheless claimed that the Statute of Elizabeth's safe harbor preserved the conveyance because he was a bona fide purchaser without knowledge that the transfer was fraudulent. *See id.*; *see also* 13 Eliz., ch. 5[6]. The court disagreed. It held that the safe harbor did not protect Twyne because he was aware of the transfer's fraudulent purpose. *Twyne's Case*, 3 Coke Rep. at 81a-81b, 73 Eng. Rep. at 814. Thus, Twyne himself was guilty of fraud for knowingly participating in a deliberately fraudulent conveyance. *See id.* at 83b, 76 Eng. Rep. at 823.

Graham likewise involved a conveyance that was invalidated under the Statute of Elizabeth because the recipient purchased the property knowing that the transferor intended to hinder creditors. In an effort to "protect his property from the claims of

creditors," a debtor sold all his property to Graham. 14 C.B. at 414, 139 Eng. Rep. at 170. Although Graham himself "did not directly intend to delay or defraud creditors," his *knowledge* that the debtor had that intent was sufficient to render the transaction fraudulent and void under the Statute of Elizabeth. *Id.* at 418, 139 Eng. Rep. at 172; *see id.* at 414, 139 Eng. Rep. at 171.

2. The Statute of Elizabeth, which "was declaratory of the common law," had a significant influence on the development of U.S. law. *Sumner v. Hicks*, 67 U.S. 532, 533-34 (1862); *see, e.g.*, *BFP*, 511 U.S. at 541. Therefore, U.S. courts before 1978 commonly used the term "actual fraud" to refer to fraudulent-transfer schemes that were *actually intended* to hinder or delay creditors, regardless of whether there was any misrepresentation.

In *Coder*, for example, this Court stated:

> What is meant when it is required that [fraudulent] conveyances, in order to be set aside, shall be made with the intent on the bankrupt's part to hinder, delay, or defraud creditors? This form of expression is familiar to the law of fraudulent conveyances, and was used at the common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there shall be *actual fraud*; and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying, or defrauding creditors. The question of fraud depends upon the motive.

213 U.S. at 242 (emphasis added). The Court concluded that there was no "actual fraud" because the transferor "had no intention to hinder, delay or defraud his creditors," and the recipient acted in "good faith," "was ignorant of the insolvency of the grantor, and had no reason to believe that a preference was intended." *Id.* at 244-45.

While riding Circuit in 1821, Justice Story likewise recognized that conveyances that were deliberately orchestrated to defraud creditors constituted "actual fraud." *Bean*, 2 F. Cas. at 1159. The debtor in *Bean* conveyed everything he owned to his children in order to avoid paying his creditors. *See id.* at 1156-59. Because the transfers were "designe[d] to injure and defeat creditors," Justice Story concluded that they were "infected" with fraud and "utterly void" at common law. *Id.* at 1158-59. Any other result would improperly allow "the [grantor] or his coadjutors in such conduct to reap the fruits of their dishonesty." *Id.* at 1154. Instead, he emphasized, courts must "be rigid in denying" any "indulgence" to those "who are guilty of bad faith" in making or knowingly receiving an actually fraudulent transfer. *Id.* at 1158-59; *see id.* at 1155 ("[A] party enabling another to commit a fraud is made answerable for the consequences[.]").

And in *Lovett v. Faircloth*, the Fifth Circuit explained that "proof of intent to hinder or delay [creditors] is proof of *actual fraud*." 10 F.2d 301, 304 (5th Cir. 1925) (emphasis added). When Faircloth's brother-in-law was on the brink of bankruptcy, Faircloth agreed to loan him money in exchange for a note secured by nearly all of his brother-in-law's property. *Id.* at 302. Creditors subsequently forced the brother-in-law into bankruptcy and argued that

the conveyance to Faircloth was invalid because it "was made with the intent and purpose on the part of the bankrupt to hinder, delay, or defraud creditors," and because "Faircloth was not a purchaser in good faith." *Id.* at 303. The court agreed. In holding that the conveyance was void, it emphasized that Faircloth participated in the transfer "with full knowledge" of his brother-in-law's "intent to hinder and delay creditors." *Id.* at 303-04.

Numerous other cases recognize that "[p]roof of intent to hinder or delay [creditors] is proof of actual fraud." *Hofmann v. La Fontaine*, 16 F. Supp. 748, 752 (D. Wyo. 1936); *see, e.g.*, *Wehrman v. Conklin*, 155 U.S. 314, 328 (1894) (reaffirming longstanding principle that courts must "set aside" any "conveyance [that] is attended with actual fraud"); *Smith v. Wilder*, 120 So. 2d 871, 882 (Ala. 1960) ("An existing creditor seeking to set aside a conveyance may do so ... because of actual fraud," which "denotes the actual mental operation of intending to defeat or delay the rights of the creditor."); *Sands v. Codwise*, 4 Johns. 536, 596-99 (N.Y. Ct. Corr. Err. 1808) (finding that the transfer of a property deed was "fraudulent in fact" and "an act founded in actual fraud," because the transferor intended to transfer the property out of the reach of his creditors for an inadequate price); *see also BFP*, 511 U.S. at 535 (describing transfers made with actual fraudulent intent as "infected by actual fraud").

3. Of particular significance here, and consistent with its historical roots in the Statute of Elizabeth, the common law recognized that a transferee who receives property through what he knows to be a

deliberately fraudulent transfer commits actual fraud himself.

In *Daisy Roller Mills v. Ward*, for example, the defendant received two pieces of property through transfers that he knew were "inten[ded] to hinder, delay, and defraud" creditors. 70 N.W. 271, 272-73 (N.D. 1897). The court held that the defendant's acceptance of such fraudulent transfers "actively and purposely aid[ed] in [their] consummation" and made him a culpable participant in the "actual fraud." *Id.* Because the defendant's fraud was "actual" rather than "constructive," he did not "come[] into court ... with clean hands," and the conveyance was therefore void. *Id.* at 273, 275.

Garland likewise recognized the "importan[ce]" of notice to a purchaser that a conveyance was "inten[ded] to defraud creditors." 4 Rand. at 304 (emphasis deleted). "Such a purchase, with notice of the fraudulent intent," would "assist the consummation of the fraud" and would itself constitute "actual fraud." *Id.* at 304, 307-08. Accordingly, when Garland obtained property through a transaction that he knew was intended to defraud creditors, he was a participant in the actual fraud. *See id.* at 305, 308. He therefore could not seek protection as a bona fide purchaser, and the conveyance was void. *See id.* at 307 ("a party to the *covin* and collusion ... could not be held to be a bona fide purchaser under the *proviso* of the Statute [of Elizabeth]").

It was thus "settled law that, where a grantor and grantee conspire to commit a fraud upon the grantor's creditors," the grantee "partakes of the

fraud with the grantor" and is "a party to a positive fraud." *Stephon v. Topic*, 180 N.W. 221, 223 (Minn. 1920); *see also, e.g.*, *Randolph v. Scruggs*, 190 U.S. 533, 538 (1903) (Holmes, J.) (allegation of "constructive fraud" on part of good-faith assignee would not invalidate the promised transfer, but "[t]he case would be different if the assignee were party to an actual fraud"); *Mackel v. Rochester*, 135 F. 904, 908 (D. Mont. 1905) (defendant committed "actual fraud" when he purchased property in a transaction he knew was intended "to hinder, delay, and defraud" creditors); *Leinbach v. Dyatt*, 230 P. 1074, 1080 (Kan. 1924) (where recipient participates in actually fraudulent scheme, knowing that it is for the purpose of defrauding others, his "own fraudulent conduct" is actual fraud); *Hofmann*, 16 F. Supp. at 749 (finding "actual fraud" on the part of the recipient of a deliberately fraudulent transfer who "intentionally accepted the transfer of funds without consideration" and to "benefit ... herself," knowing that the transfer would "hinder or delay creditors"); *Thompson v. Bickford*, 19 Gil. 1, 4 (Minn. 1872) (recipient's collusion in deliberately fraudulent transfer "present[s] a case of *actual* fraud on the part of [the recipient], as well as [the transferor]"); *Sands*, 4 Johns. at 596-98 (grantee who colluded with transferor to receive deed with intent "to cheat creditors" committed "actual fraud"). And the Bankruptcy Act of 1898 went so far as to impose criminal penalties on any person who "knowingly and fraudulently ... received" property from a bankrupt "with the intent to defeat [the] Act." Bankruptcy Act of 1898, ch. 541, § 29(b), 30 Stat. at 554.

Indeed, *Neal* reaffirms this basis for imposing actual-fraud liability on a transferee. As discussed above, *Neal* involved the sale of estate assets for inadequate consideration. *See* 95 U.S. at 707. There was no question that the executor committed a *devastavit*; nor did this Court question whether Neal's participation in that conduct amounted to a fraud on the estate. *See id.* Although the Court held that Neal was not liable for "actual fraud" because he was an innocent transferee, it made clear that he *would* have committed "actual fraud" if he had known about or been complicit in the trustee's wrongdoing. *See id.* Thus, *Neal* confirms that a party who participates in what he knows to be a fraudulent conveyance is himself guilty of "actual fraud." *See id.*

* * *

When Congress added the words "actual fraud" to § 523(a)(2)(A)'s discharge bar, the term had a settled meaning based on centuries of common-law jurisprudence. Actual fraud has never required a misrepresentation; rather, the term actual fraud has always meant any intentional fraud. Indeed, the common law has long used the term—in the specific context of debtor-creditor relations—to include deliberately fraudulent conveyances. In light of this extensive common-law history, it is clear that § 523(a)(2)(A) includes debts arising from a debtor's receipt of property through what he knows to be an intentionally fraudulent conveyance.

II. THE STRUCTURE, HISTORY, AND PURPOSE OF § 523(a)(2)(A) CONFIRM THAT ACTUAL FRAUD DOES NOT REQUIRE A MISREPRESENTATION

The structure, history, and purpose of § 523(a)(2)(A) further establish that actual fraud includes intentionally fraudulent conveyances, regardless of whether the fraudulent conduct involves a misrepresentation. Before Congress added the words "actual fraud" to § 523(a)(2)(A)'s discharge bar, the provision already barred discharge of debts for money obtained by all forms of intentional misrepresentations. Congress added "actual fraud" to extend the discharge bar to additional forms of fraudulent conduct, not merely to restate the previous scope of § 523(a)(2)(A).

Moreover, the surrounding text of § 523(a)(2)(A) comfortably encompasses debts for money or property that the debtor obtains through conveyances that he knows to be fraudulent. This understanding of § 523(a)(2)(A) is also consistent with the purposes of the Bankruptcy Code, which affords relief only to the honest but unfortunate debtor.

A. Interpreting Actual Fraud To Require A Misrepresentation Would Render Congress's 1978 Amendment Superfluous

Before Congress added "actual fraud" to § 523(a)(2)(A) in 1978, its predecessor provision already barred discharge of debts for property and money obtained by "false pretenses or false representations"—i.e., two different forms of fraudulent conduct that, together, capture all

actionable intentional misrepresentations. Congress's addition of a third category of nondischargeable debts "must have meaning," and, as the First and Seventh Circuits recognized, "the most obvious meaning is the one that comports with common law understanding": Actual fraud means all intentional fraud, including receiving property through a conveyance that the transferee knows is intentionally fraudulent. *Lawson*, 791 F.3d at 220; *see McClellan*, 217 F.3d at 893.

1. "It is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Accordingly, this Court has repeatedly recognized the importance of construing a statute so that "'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (quoting Bacon's Abridgment, sect. 2); *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) (collecting cases).

This interpretive canon is particularly powerful when Congress has amended a statute to add the language at issue. Because Congress is unlikely to enact an amendment "just to state an already existing rule," courts "presume [Congress] intends its amendment to have real and substantial effect." *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995). An interpretation that renders an amendment "superfluous" and "deprives [it] of any effect," *Milner v. Dep't of Navy*, 562 U.S. 562, 575 (2011), "cannot be the proper understanding of the statute," *Pierce Cmty. v. Guillen*, 537 U.S. 129, 145 (2003).

For example, *Louisville & Nashville Railroad Company v. Mottley* involved a statute prohibiting common carriers from demanding or collecting compensation "greater or less or different" than the rates specified in the published tariff. 219 U.S. 467, 473 (1911) (internal quotation marks omitted). In 1906, Congress amended the statute to add the word "different" to the statute's preexisting prohibition on charging rates "greater or less" than the published tariffs. *See id.* at 475. Before the amendment, the terms "greater" and "less," with their distinct meanings, together prohibited carriers from charging either more or less money than the tariff amounts. Congress's addition of the word "different" was not merely a synonym for "greater or less." Rather, this Court read it to proscribe an additional form of deviation from published tariffs, i.e., "the acceptance of property of various kinds ... in place of money for services performed by the carrier." *Id.* at 476. Emphasizing the need to avoid a construction that would render this "material addition" "superfluous or meaningless," this Court therefore held that "different" meant different *in kind* rather than merely different in *amount*. *See id.* at 475-76.

Guillen likewise rejected a statutory interpretation that would render Congress's addition of a single term "an exercise in futility." 537 U.S. at 145. The statute at issue protected from discovery certain data "compiled for the purpose of identifying, evaluating, or planning the safety enhancement" of hazardous roadways. *Id.* at 135 (internal quotation marks omitted). Congress later expanded the evidentiary privilege by "changing the language from 'compiled' to 'compiled *or collected*.'" *Id.* at 145; *see id.* at 135.

Guillen rejected an interpretation of this language that would "protect from disclosure only information that was already protected before the amendment." *Id.* at 145. Such an interpretation, the Court explained, would give Congress's amendment "no 'real and substantial effect' and, accordingly cannot be the proper understanding of the statute." *Id.* *See also, e.g.*, *Milner*, 562 U.S. at 575 (rejecting interpretation of FOIA exemption that would render congressional amendment "superfluous" and "deprive[]" it "of any effect"); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 419 (1992) (rejecting interpretation of statute that would make amendment "superfluous"); *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 11 (1975) (same).

2. Congress amended § 523(a)(2)(A) to add "actual fraud" as a third category of wrongdoing for which debts are nondischargeable. That amendment must "have real and substantial effect." *Stone*, 514 U.S. at 397. Because the pre-amendment discharge bar *already* applied to debts arising from false pretenses and false representations—collectively, the full range of unlawful intentional misrepresentations—Congress's addition of "actual fraud" must cover something that the discharge bar did not cover before. *See Guillen*, 537 U.S. at 145; *Louisville*, 219 U.S. at 475-76.

At common law, false pretenses and false representation referred to different kinds of intentional misrepresentations—namely, criminal and tortious assertions or omissions. False pretenses was a crime that Parliament created in 1757 to fill a loophole left by larceny and not filled by any other criminal prohibition. *See* LaFave, SUBSTANTIVE

CRIMINAL LAW § 19.7(a) (citing 30 Geo. II, c. 24 (1757)). Most U.S. states enacted similar statutes, criminally punishing a materially false assertion or omission that "causes the victim ... to pass title to ... his property to the wrongdoer." *Id.* § 19.7; *see also* 35 C.J.S. False Pretenses § 1; 32 Am. Jur. 2d False Pretenses § 1. Moreover, the wrongdoer must *know* "his representation to be false and ... *intend*[] thereby to defraud the victim." LaFave, *supra*, § 19.7 (emphasis added); *see id.* § 19.7(f); *see also* 35 C.J.S. False Pretenses § 1 (false pretense "is calculated and intended to deceive"); 32 Am. Jur. 2d False Pretenses § 28 ("To sustain a charge of obtaining property or money by false pretenses, it is essential to show a fraudulent intent.").

Through the term "false representations," Congress ensured that the discharge bar also applied to debtors who committed tortious misrepresentations, not just those convicted of criminal false pretenses. A "false representation" is "[a] representation which is untrue, willfully made to deceive another to his injury." BLACK'S LAW DICTIONARY 724 (4th ed. St. Paul 1968). Thus, the term is a synonym for fraudulent misrepresentation (also known as "deceit"). *See* Restatement (Second) Torts ch. 22, topic 1 ("Fraudulent Misrepresentation (Deceit)"). Fraudulent misrepresentation was a common-law tort that required a *knowingly* false representation *intended* to induce the victim to act or refrain from acting. *See* Prosser, TORTS § 105 at 685-86 (4th ed. 1971); Restatement (Second) Torts §§ 525, 526, 531, 537, 546.

"False pretenses" and "false representations" therefore have distinct meanings. Collectively, they

cover all forms of intentional *criminal* and *tortious* misrepresentation.[5] Of central importance here, their combined presence in § 523(a)(2)(A)'s predecessor meant that, before Congress amended the Code in 1978, debtors could not obtain a discharge of any debt resulting from any *intentional misrepresentation.*

By adding a third category to § 523(a)(2)(A) ("actual fraud"), Congress did not merely add a term that overlapped completely with the scope of the two other preexisting categories of nondischargeable debts. After all, Congress does not amend statutes "just to state an already existing rule." *Stone*, 514 U.S. at 397. Congress's addition of "actual fraud" must cover something in addition to intentional misrepresentations. *See Guillen*, 537 U.S. at 145; *Louisville*, 219 U.S. at 475-76. And indeed, the settled understanding of actual fraud—set forth in the common law and in *Neal*, which Congress codified in § 523(a)(2)(A)—explains the meaning of Congress's amendment. *See supra*, Part I.

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[5] Some courts have further distinguished between false pretenses and false representations on the grounds that the former may be implied from conduct, while the latter requires an express statement. *See, e.g.*, *In re Appling*, 527 B.R. 545, 549-50 (Bankr. M.D. Ga. 2015); *In re Hartley*, 479 B.R. 635, 642 (S.D.N.Y. 2012); *In re Blackburn*, 68 B.R. 870, 877 n.2 (Bankr. N.D. Ind. 1987).

B. The Surrounding Statutory Text Encompasses Debts For Money Or Property Obtained By Deliberately Fraudulent Transfers

Section 523(a)(2)(A)'s surrounding text also readily applies to a debtor who receives property through what he knows to be an intentionally fraudulent transfer. The statute bars discharge of "any debt ... for money [or] property ... to the extent obtained by ... actual fraud." 11 U.S.C. § 523(a)(2)(A). "The most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, services, or ... credit' that the debtor has fraudulently obtained[.]" *Cohen*, 523 U.S. at 218 (citing *Field*, 516 U.S. at 61, 64, for the proposition that § 523(a)(2)(A) bars "discharge of debts 'resulting from' or 'traceable to' fraud").

A "debt" means any enforceable obligation, and the phrase "obtained by" requires that the defendant receive money or property *as a result of* his fraud. As discussed above, a transferee commits actual fraud by receiving money or property through a conveyance that he knows is designed to defraud creditors. *See supra*, Part I.B. Therefore, such a debtor "obtains" that "money or property" fraudulently, i.e., "by" "actual fraud," and § 523(a)(2)(A) consequently bars discharge of any resulting "debt."

While this statutory text is clear, two decisions of this Court further explicate the broad sweep of § 523(a)(2)(A), and its purpose to bar discharge of all debts arising from all forms of actual fraud.

1. In *Archer v. Warner*, this Court considered whether a debt created by a settlement agreement is

nondischargeable under § 523(a)(2)(A) where the underlying claims involve alleged fraud. 538 U.S. 314, 317-18 (2003). Some courts of appeals had found those debts dischargeable, notwithstanding § 523(a)(2)(A), because they viewed the settlement agreement as "a kind of 'novation'" that "replaced (1) an original potential debt ... for money obtained by fraud with (2) a new debt." *Id.* at 318. According to those courts, the "new debt" was dischargeable because it was "for money promised in a settlement contract," rather than "for money obtained by fraud." *Id.*

Archer repudiated this approach as inconsistent with the text and purpose of the discharge bar, which Congress enacted "to ensure that 'all debts arising out of' fraud are 'excepted from discharge,' no matter what their form." *Id.* at 321 (quoting *Brown*, 442 U.S. at 138). Because Congress intended "the fullest possible inquiry" to identify debts arising from fraud, even an agreement that "worked a kind of novation" would "not bar" creditors "from showing that the [underlying] debt arose out of 'false pretenses, a false representation, or actual fraud,' and consequently is nondischargeable." *Id.* at 321, 323. Thus, *Archer* rejected the argument that "a debt for money promised in [a] settlement agreement" cannot "*also* amount to a debt for *money obtained by fraud*." *Id.* at 319 (emphasis added).

The Court later expanded upon these principles in *Cohen*, which held that § 523(a)(2)(A) "prohibit[s] the discharge of *any* liability arising from a debtor's fraudulent acquisition of money, property, etc., including an award of treble damages for the fraud." 523 U.S. at 221 (emphasis added). The debtor in

Cohen was a landlord who overcharged his tenants for rent, thereby violating a local rent-control ordinance. *Id.* at 215. After failing to obey a court order to refund the overpayments, the landlord declared bankruptcy and sought to discharge the debt. *See id.* The bankruptcy court held that his debt was nondischargeable under § 523(a)(2)(A) because the landlord had committed "actual fraud." *Id.* It further determined that his conduct was "an unconscionable commercial practice" under state law and awarded the tenants treble damages. *Id.* at 215-16. Explaining that "§ 523(a)(2)(A) encompasses all obligations arising out of fraudulent conduct," the bankruptcy court concluded that the punitive damages were nondischargeable. *Id.* at 216.

This Court agreed. It first considered whether a punitive damages award constitutes a "debt" under § 523. *Id.* at 218. A debt, *Cohen* explained, "is defined in the Code as 'liability on a claim,' a 'claim' is defined in turn as a 'right to payment,' and a 'right to payment,' ... is nothing more nor less than an enforceable obligation." *Id.* (citing 11 U.S.C. §§ 101(12), 101(5)(A); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). These definitions "reflect Congress' broad view of the class of obligations that qualify as a 'claim' giving rise to a 'debt,'" and *Cohen* concluded that "they plainly encompass treble damages": "An award of treble damages is an 'enforceable obligation' of the debtor, and the creditor has a corresponding 'right to payment.'" *Id.*

Cohen further held that the debt at issue was for money or property "obtained by fraud." *Id.* at 218-19. This language does not require the debt *itself* to have

been obtained by fraud. *See id.* at 218 ("'To the extent obtained by' modifies 'money, property, services, or credit'—not 'any debt[.]'"). Nor does the phrase "obtained by" restrict the scope of the discharge bar to "the *value* of the money, property, or services *received* by the debtor." *Id.* at 219 (emphasis added).

Instead, "obtained by" requires causation—that the debtor's fraudulent conduct has caused him to obtain money or property. *See id.* at 218. And "[o]nce it is established that specific money or property has been obtained by fraud," then "'any debt' arising therefrom is excepted from discharge." *Id.* Emphasizing Congress's concern with protecting victims of fraud and making them "whole," *Cohen* rejected the notion that § 523(a)(2)(A) "impos[es] a restitutionary ceiling on the extent to which a debtor's liability is nondischargeable" such that a debtor could "discharge any liability for losses caused by his fraud in excess of the amount he initially received," or "obtained by" the fraud. *Id.* at 219, 223. Thus, *Cohen* held that punitive damages awarded on account of a debtor's fraudulent acquisition of money were nondischargeable, even though the punitive damages were not themselves money that the debtor obtained through fraud. *Id.* at 215.

2. These decisions reaffirm what the statute already makes clear: Section 523(a)(2)(A)'s language encompasses debts for money or property obtained through transfers that the recipient knows to be fraudulent.

Cohen and *Archer* show that, where a debtor's fraud causes him to receive money or property, any

resulting liability is a debt for money or property "obtained by" fraud. The phrase "obtained by" fraud means that the debtor's fraudulent conduct causes him to obtain the money or property at issue. *See Cohen*, 523 U.S. at 218-19, 222-23; *see also Archer*, 538 U.S. at 319. A party who receives property through a transfer that he knows is intended to defraud creditors commits actual fraud, *see supra*, Part I.B., and therefore has obtained such property by actual fraud. Moreover, there is no question that the creditor's loss is caused by the intentionally fraudulent conveyance. *Cf. Cohen*, 523 U.S. at 222-23.

These cases also confirm that "debt" is construed broadly to mean "any liability arising from a debtor's fraudulent acquisition of money, property, etc." *Id.* at 220-21; *see Archer*, 538 U.S. at 321. Knowing participation in a deliberately fraudulent transfer is a form of fraud that results in liability for the transferee. *See supra*, Part I.B. That resulting liability is an "enforceable obligation," and the creditor has a "corresponding right to payment," *Cohen*, 523 U.S. at 218 (internal quotation marks omitted). The term "debt" thus "plainly encompass[es]" all liability resulting from the knowing receipt of an intentionally fraudulent transfer. *See id.*

C. Interpreting Actual Fraud According To Its Common-Law Meaning Is Consistent With The Purposes Of The Bankruptcy Code

Construing "actual fraud" under § 523(a)(2)(A) to encompass any intentional fraud, not merely forms of

fraud that involve misrepresentations, is also consistent with the Bankruptcy Code's "basic policy" of "affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (quoting *Grogan*, 498 U.S. at 287); *see Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007); *Brown*, 442 U.S. at 128. A bankrupt debtor who receives property in a deliberate fraudulent transfer, knowing of the transferor's intent to defraud creditors, blatantly abuses the Bankruptcy Code. Congress did not intend to reward such behavior; to the contrary, by the plain terms of § 523(a)(2)(A), "Congress concluded that preventing fraud is more important than letting defrauders start over with a clean slate." *McClellan*, 217 F.3d at 893 (citation and quotation marks omitted).

1. "No bankruptcy bill can be, or ought to be, framed for the benefit of thieves and scoundrels, but for honest creditors and honest debtors." H.R. Rep. No. 55-65, at 43 (1897). Congress therefore has long been concerned with protecting bankruptcy from becoming an "engine of fraud and corruption." Cong. Globe, 39th Cong., 2d Sess. 998, 1012 (1867) (statement of Sen. Cowan). Indeed, when debating the Bankruptcy Act of 1867, some members of Congress believed that earlier attempts at bankruptcy legislation had failed because they "did not provide as strictly as [they] ought to have done against fraud." *Id.* at 1004 (statement of Sen. Poland). Accordingly, Congress wrote the 1867 Act to ensure that "no party" would be "entitled to [its] benefit[s] ... unless he can show that he has been perfectly innocent of all fraud." Cong. Globe, 39th Cong., 2d Sess. 975, 981 (1867) (statement of Sen.

Johnson). Among other things, Congress provided that "*no* discharge shall be granted, or, if granted, be valid, if the bankrupt ... has been guilty of any fraud whatever contrary to the true intent of this act." Ch. 176, § 29, 14 Stat. 517, 532 (1867) (emphasis added).

When Congress sought to modernize the Bankruptcy Act in 1898, it remained concerned about creating a system in which "the honest debtor will be treated with consideration and within a reasonable time be discharged," but "the dishonest bankrupt will be explicitly charged with his wrongdoing." 31 Cong. Rec. 1754, 1788 (1898); *see* 31 Cong. Rec. 6401, 6434 (1898) (statement of Rep. Ray) ("[I]t is absolutely essential that we guard against frauds and so frame our law that dishonest men shall not have the benefits of it."). This "wise public policy" animated the Act's bar of "[d]ischarges from debts created by wrongs, frauds, etc." H.R. Rep. No. 55-65 at 43; 31 Cong. Rec. at 6428; *see* Ch. 541, § 17(a)(2), 30 Stat. at 550 (barring discharge of "debts" that "are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another").

The current version of the Code continues to embody this "basic policy ... of affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (quoting *Grogan*, 498 U.S. at 287). Congress accordingly enacted a broad discharge bar that encompasses a range of wrongdoing. *See supra* at 2-3. Specifically, § 523(a)(2)(A) reflects Congress's judgment that the interest of defrauded creditors in "being made whole" "outweighs the debtors' interest in a complete fresh start." *Cohen*, 523 U.S. at 222

(internal quotation marks omitted). Moreover, when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, it extended § 523(a)(2)(A)'s discharge bar to apply to debtors in Chapter 13 cases. Pub. L. No. 109-8, § 314(b), 119 Stat. 23, 88 (2005). That change was part of a broader effort "to remedy certain types of fraud and abuse within the [Bankruptcy Code]." H.R. Rep. No. 109-31, at 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 101.

2. Interpreting § 523(a)(2)(A) to bar discharge of debts resulting from intentional fraud, regardless of whether the fraud takes the form of a misrepresentation, is consistent with this longstanding policy.

Deliberately fraudulent transfer schemes strike at the heart of Congress's concern about fraud. These schemes create the potential for a "two-step routine ... in which Debtor A transfers valuable property to B for nothing in order to keep it out of the hands of A's creditor and B then sells the property and declares bankruptcy in an effort to shield herself from liability for having colluded with A to defeat the rights of A's creditor." *McClellan*, 217 F.3d at 893. As both the First and Seventh Circuits concluded, such collusion to defraud creditors "is as blatant an abuse of the Bankruptcy Code as [one] can imagine." *Id.*; *see Lawson*, 791 F.3d at 224. Permitting such behavior would "turn[] the bankruptcy code into an engine for fraud." *McClellan*, 217 F.3d at 893; *see Lawson*, 791 F.3d at 224. That would contravene the purpose underlying the Bankruptcy Code as a whole, and the specific objective of § 523(a)(2)(A).

This Court has repeatedly rejected narrow constructions of § 523(a)(2)(A) that would thwart Congress's purpose to afford relief for only the *honest* but unfortunate debtor. *See Cohen*, 523 U.S. at 222-23; *Grogan*, 498 U.S. at 287; *Brown*, 442 U.S. at 128; *see also Archer*, 538 U.S. at 321. It should do the same here.

III. THE FIFTH CIRCUIT WAS WRONG TO HOLD THAT ACTUAL FRAUD CATEGORICALLY REQUIRES A MISREPRESENTATION

The Fifth Circuit held that a misrepresentation is a "necessary prerequisite" to actual fraud under § 523(a)(2)(A). Pet. App. 17a; *see* Pet. App. 12a. The Fifth Circuit's reasons do not withstand scrutiny.

A. The Fifth Circuit Misread *Field*

The Fifth Circuit based its holding primarily on its misreading of this Court's decision in *Field*. In fact, *Field* is relevant here only because its methodology establishes that *not* all forms of actual fraud categorically require a misrepresentation. *Field* explained that actual fraud should be understood by reference to the common law in 1978, when that term was added to § 523(a)(2)(A). *See* 516 U.S. at 69. As explained above, and as both the First and Seventh Circuits recognized, the common-law understanding of actual fraud in 1978 encompassed deliberate fraudulent-transfer schemes. *See Lawson*, 791 F.3d at 220; *McClellan*, 217 F.3d at 893; *supra*, Part I.B.

The Fifth Circuit nevertheless said that "*Field* appeared to assume that a false representation is necessary to establish 'actual fraud.'" Pet. App. 10a. As *McClellan* explained, however, the particular type

of fraud in *Field* "took the form of a misrepresentation, and the only issue was the nature of [the creditor's] reliance" on the misrepresentation that was required "to prove fraud *in such a case*." 217 F.3d at 892 (emphasis added). "Nothing in [this] Court's opinion suggests that misrepresentation is the *only* type of fraud that can give rise to a debt that is not dischargeable under section 523(a)(2)(A)." *Id.* (emphasis added).

Specifically, the debtor, Field, purchased land with a promissory note that was secured by a second mortgage. 516 U.S. at 61. The mortgage deed gave the sellers a right to demand the entire balance on the note if Field conveyed the land without first obtaining their consent. *Id.* at 62. A few months later, Field transferred the land without telling the sellers or seeking their consent. *Id.* Instead, he sent them a letter saying that he was considering conveying the property and asking them to waive the due-on-sale clause prospectively. *Id.* The sellers refused. But based on Field's false representation that he was merely considering a conveyance, and his failure to disclose that he had already conveyed the land, they did not demand immediate payment on the note. *See id.* at 62-63. When Field later filed for bankruptcy, the sellers argued that his debt on the note was nondischargeable under § 523(a)(2)(A) because, they argued, he defrauded them into extending him additional credit (i.e., not enforcing the due-on-sale clause immediately) based on his misrepresentation. *Id.*

The only form of fraud alleged in *Field*, and the only basis asserted for nondischargeability, was therefore Field's misrepresentation to his creditors.

And the only issue that this Court faced was, in a case that indisputably involved a misrepresentation, "the level of a creditor's reliance on [the] fraudulent misrepresentation necessary to place a debt ... beyond release." *Id.* at 61. After all, if the sellers did not rely on the misrepresentation to extend credit, then the misrepresentation could not have caused their loss, *see* Restatement (Second) Torts § 546, and Field could not have obtained anything by fraud. And if, as the Fifth Circuit surmised, "the debt at issue would not have been dischargeable absent a representation," Pet. App. 10a n.8, that is only because there was no *other* fraudulent conduct alleged apart from a misrepresentation. *Field* did not speak to whether other types of fraud require a misrepresentation.

B. Interpreting Actual Fraud According To Its Common-Law Meaning Does Not Render Other Provisions Of The Bankruptcy Code Superfluous

The Fifth Circuit also suggested in passing that other provisions of the Bankruptcy Code "may be rendered redundant" by Husky's reading of § 523(a)(2)(A). Pet App. 16a. That concern is unfounded.

1. The Fifth Circuit first noted that "[i]t would appear odd" for § 523(a)(2)(A) to extend beyond misrepresentations because the Bankruptcy Code contains a separate provision that excepts certain fraudulent transfers from discharge. Pet. App. 16a (citing 11 U.S.C. § 727(a)(2)). In relevant part, § 727(a)(2) provides that "[t]he court shall grant a discharge, unless ... the debtor, with intent to hinder,

delay, or defraud a creditor ... has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed ... property of the debtor ... or property of the estate." 11 U.S.C. § 727(a)(2).

Sections 523(a)(2)(A) and 727(a)(2) apply in different circumstances and serve different functions. Section 727(a)(2) applies only where the debtor diminishes the bankruptcy estate by *transferring property away* from the reach of its creditors. *See id.* That is, it applies only where the debtor is the *transferor* in a fraudulent transfer scheme. Unlike § 523(a)(2)(A), it does not apply to a debtor who is alleged to have *received* property as part of a fraudulent scheme. *See, e.g.*, *Lawson*, 791 F.3d at 216 (debtor knowingly accepted conveyance designed to prevent creditor from collecting a judgment against her father); *McClellan*, 217 F.3d at 893 (debtor sold $200,000 worth of machinery that she had purchased for $10 from insolvent brother).

Moreover, when they do apply, §§ 523(a)(2)(A) and 727(a)(2) have different consequences and purposes. Unlike § 727, which blocks a debtor's ability to obtain a discharge of any debts whatsoever, § 523 is targeted more narrowly at the discharge of particular debts. Thus, a debtor who violates § 727 is ineligible for any discharge, while a debtor who violates § 523 is ineligible to discharge only those debts that have been specifically tainted by fraud. In addition, § 727(a)(2) applies only to Chapter 7 cases, and therefore makes it a poor vehicle for protecting victims of fraud. *See* 11 U.S.C. § 103(b). Section § 523(a)(2)(A), by contrast, applies to debtors in both Chapter 7 and Chapter 13 cases. *See* 11 U.S.C.

§§ 727(b), 1328(a)(2). Congress chose to make all victims of fraud whole through the discharge bar, not merely victims of debtors in Chapter 7 proceedings.

2. The Fifth Circuit also wrongly concluded that two "other exceptions to discharge in [§ 523(a)] may be rendered redundant" by Husky's reading of actual fraud: Section 523(a)(4), which excepts debts "for fraud or defalcation while acting in a fiduciary capacity," and § 523(a)(6), which excepts debts "for willful and malicious injury by the debtor," Pet. App. 16a (citing 11 U.S.C. § 523(a)(4), (a)(6)). But contrary to the Fifth Circuit's reasoning, both of these provisions differ in scope from § 523(a)(2)(A)'s actual fraud provision. And to the extent that there is any overlap, it is a function of Congress's drafting rather than of any particular definition of actual fraud.

a. Interpreting actual fraud according to its common-law meaning will not render § 523(a)(4)'s fiduciary fraud and defalcation provisions redundant. As this Court observed in *Bullock v. BankChampaign, N.A.*, defalcation and fraud cover different types of conduct. *See* 133 S. Ct. 1754, 1760 (2013) ("'[D]efalcation,' unlike 'fraud,' may be used to refer to *nonfraudulent* breaches of fiduciary duty."). And the *fiduciary* fraud covered by § 523(a)(4) is both narrower and broader than "actual fraud" under § 523(a)(2)(A). Fraud in a fiduciary capacity, by definition, applies only when the debtor owes a fiduciary duty to another party, and thus reaches a narrower range of conduct than actual fraud. *See id.* However, because fiduciaries owe a heightened duty of care, *see* Restatement (Second) Trusts §§ 169-85 (1959) (duties of trustee), some conduct may be fraudulent only if done in a fiduciary capacity, *see,*

e.g., Restatement (Second) Torts § 551(2)(a) (fiduciary duty to disclose information gives rise to actionable misrepresentation, even though same conduct by non-fiduciary may not be actionable). In any event, any overlap between § 523(a)(2)(A)'s actual fraud bar and § 523(a)(4)'s fiduciary fraud bar is a function of Congress's decision to include the word "fraud" in both provisions—not of any particular interpretation of actual fraud.

b. Nor does Husky's interpretation of actual fraud render § 523(a)(6) superfluous. Section 523(a)(6) extends to "intentional torts" involving "willful and malicious injury" that do not involve any type of "fraud" at all, such as assaulting someone or setting his car on fire. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998). For this reason alone, the Fifth Circuit's concern that § 523(a)(2)(A) would render § 523(a)(6) redundant is unfounded.

Moreover, unlike § 523(a)(2)(A), which applies in *all* Chapter 13 cases, § 523(a)(6) does not apply in most Chapter 13 cases. *See* 11 U.S.C. § 1328(a)(2); *Lawson*, 791 F.3d at 223 & n.13. Thus, under the Fifth Circuit's interpretation, "especially clever" debtors would be able to defraud their victims through deliberate fraudulent-transfer schemes, and then avoid any discharge bar by filing for bankruptcy under Chapter 13 instead of Chapter 7. *Lawson*, 791 F.3d at 224. Congress—having extended § 523(a)(2)(A) to Chapter 13 in 2005 amendments to the Bankruptcy Code precisely to remedy fraud and abuse in bankruptcy, *see supra* at 46—could not possibly have intended that result.

C. Congress Has Determined That Only Honest Debtors Are Entitled To A Fresh Start

Finally, the Fifth Circuit reasoned that § 523(a)(2)(A) should be construed narrowly to give debtors a "fresh start." Pet. App. 16a (internal quotation marks omitted). That policy, however, "provides little assistance in construing a section expressly designed to make some debts nondischargeable." *United States v. Sotelo*, 436 U.S. 268, 280 (1978). As this Court has explained, a provision like § 523 "is not a compassionate section for debtors" because "it demonstrates congressional judgment that certain problems ... override the value of giving the debtor a wholly fresh start." *Bruning v. United States*, 376 U.S. 358, 361 (1964) (construing § 523's predecessor). Thus, where, as here, the debt arises from actual fraud, Congress has already determined that the interest of defrauded creditors in "being made whole" "outweighs the debtors' interest in a complete fresh start." *Cohen*, 523 U.S. at 222 (internal quotation marks omitted).

* * * * *

The Fifth Circuit erred in holding that a misrepresentation is categorically required to establish nondischargeability under § 523(a)(2)(A). Section 523(a)(2)(A) bars the discharge of any debt arising from "actual fraud," a term that includes receiving money or property in a transfer that the recipient knows is intended to defraud creditors. The Fifth Circuit never considered whether Husky established that Ritz's conduct met this standard because it found the lack of a misrepresentation

dispositive. Accordingly, Husky should have an opportunity to establish on remand that Ritz incurred a debt for money or property that he obtained by a deliberately fraudulent transfer.

CONCLUSION

For these reasons, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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STATUTORY ADDENDUM

11 U.S.C. § 523

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $650[1] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $925 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;
(13) for any payment of an order of restitution issued under title 18, United States Code;
(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);
(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);
(14B) incurred to pay fines or penalties imposed under Federal election law;
(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;
(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall

except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of

the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or

liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

11 U.S.C. § 727

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any

recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under

section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.